U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11895069

Date: JAN. 29, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, an actor, seeks classification as an alien of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that although the record established that the Petitioner satisfied the initial evidentiary requirements, it did not establish, as required, that the Petitioner has sustained national or international acclaim and is an individual in the small percentage at the very top of the field. The Director also concluded that the Petitioner did not establish that he seeks to enter the United States to continue working in his area of claimed extraordinary ability. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with our discussion below.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to aliens with extraordinary ability if:

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); see also *Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

The petition must also be accompanied by clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States. 8 C.F.R. § 204.5(h)(5).

II. ANALYSIS

A. Final Merits Determination

The Petitioner has performed in over 50 plays at the [redacted]'s Art Theatre, including the lead in [redacted], described as a classic modern play. The Petitioner also performed in the title role in a television series called [redacted]. After reviewing all of the evidence in the record, we agree with the Director that the Petitioner has met at least three of the initial evidentiary criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). The Petitioner claims to have met more than three of these criteria, but detailed discussion of the additional criteria would not affect the outcome of the decision and therefore we reserve those issues.[1]

Because the Petitioner met at least three of the initial criteria, the Director proceeded to a final merits determination. The Director concluded that that the Petitioner has not established the sustained national or international acclaim required for the classification. On appeal, the Petitioner does not address the Director's specific conclusions. Instead, the Petitioner contends that *Kazarian* does not

[1] *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

require, or even permit, a final merits determination. The Petitioner contends that, by satisfying at least three of the initial evidentiary criteria, he has established eligibility.

The Petitioner's interpretation of *Kazarian* is incorrect. That decision does not indicate that satisfaction of three or more criteria should inevitably result in the approval of the petition. Instead, the Court clearly described a two-step process, *first* evaluating the evidence within the initial criteria, and *then* determining whether that evidence establishes the required acclaim:

> If a petitioner has submitted the requisite evidence [under 8 C.F.R. § 204.5(h)(3)], USCIS [U.S. Citizenship and Immigration Services] determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3).

Kazarian at 1119-20. The criteria at 8 C.F.R. § 204.5(h)(3) do not, by themselves, establish acclaim. Instead, they address an "antecedent procedural question" that precedes the "final merits determination." *Id.* at 1121. USCIS has adopted this approach in a policy memorandum.[2]

Notwithstanding the deficiencies in the Petitioner's argument, there are also issues in the Director's decision which must be addressed. The Director acknowledged the Petitioner's prizes and media coverage, but stated that: "Performance awards and media attention are common in the entertainment industry, especially among actors." The Director concluded that the Petitioner could not establish sustained acclaim without further documentation, "such as evidence that [the] petitioner has [received] an unusually large number of recognized awards or an unusually large amount of attention in major media."

The Director's analysis did not give sufficient attention to the nature of the evidence in the record. For example, the published articles in the record describe the Petitioner as an established and highly successful actor. One article indicates that the Petitioner played an iconic stage role for over 20 years. Another states that his role as a detective in a television series "made him a well-known big star." The articles reflect knowledge of the Petitioner's past work, and presuppose the readers' familiarity with that work, indicating long-standing attention to his career beyond the superficial biographical details that can accompany an introduction to a previously obscure performer. It is also significant that the articles span more than a decade, indicating sustained media interest rather than a single burst of attention that immediately preceded the filing of the petition (which would raise questions about the circumstances of their publication).

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[2] USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 4 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda (stating that USCIS officers should then evaluate the evidence together when considering the petition in its entirety to determine if the petitioner has established, by a preponderance of the evidence, the required high level of expertise for the immigrant classification).

The submitted evidence presents a facially plausible claim that the Petitioner has earned sustained national acclaim in China. The Director does not appear to have taken all of the relevant information into account, concentrating on the quantity, rather than the content, of the Petitioner's awards and media articles. Further analysis and consideration of the record is necessary.

B. Continued Work in the United States

The Director determined that the Petitioner did not provide sufficient information to show how he will continue to work in his field, as required by section 203(b)(1)(A)(ii). The regulation at 8 C.F.R. § 204.5(h)(5) requires the Petitioner to submit clear evidence that the alien is coming to the United States to continue work in the area of expertise. Such evidence may include letter(s) from prospective employer(s), evidence of prearranged commitments such as contracts, or a statement from the beneficiary detailing plans on how he or she intends to continue his or her work in the United States.

The Petitioner submits a two-page "Employment Contract" between himself and [redacted] in [redacted], California. The Director raised two concerns about this contract. First, the record does not provide any further information about [redacted] Second, the contract is in English, which the Petitioner does not speak. The Director's concerns are valid, but phrased so vaguely that the Petitioner did not have a meaningful opportunity to address these issues in response to a request for evidence or on appeal. *See* 8 C.F.R. § 103.3(a)(1)(i) (requiring the Director to explain in writing the specific reasons for denial).

In a translated statement submitted on appeal, the Petitioner states that he is unaware of any English proficiency requirement for classification as an alien of extraordinary ability. The issue, however, is not the Petitioner's English proficiency as such. Rather, the issue is that we cannot determine the extent to which the Petitioner fully comprehends an employment contract in a foreign language.

With respect to the contract with [redacted] the Director's concerns bear some elaboration. The contract indicates that [redacted] provides "entertainment performances for TV programs and TV broadcasting," but the record does not show that the company has actually produced any television programming. The street address for the company belongs to a single-family house. The contract does not list any named projects, or any specific roles that the Petitioner would play.

Of particular concern, the contract appears to exist for the sole purpose of supporting the petition. A clause in the document reads: "Studio agrees that if [the Petitioner] obtains a visa other than the Extraordinary Alien visa or an immigration bias, this agreement shall not be enforceable against him." Furthermore, the contract, executed in June 2019, "shall cease to exist automatically on January 1, 2020." These provisions raise significant questions as to whether the document is a *bona fide* contract, reflecting a true mutual intention for the Petitioner to work for the studio.

We acknowledge that the Petitioner seeks an immigrant classification with no specific job offer requirement, and the regulations do not require submission of an employment contract. Nevertheless, the documentation submitted in support of the petition must reflect true facts. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b). The regulation at 8 C.F.R. § 204.5(h)(5) requires clear evidence that a given petitioner is coming to the United States to continue work in the area of expertise. Because the

Petitioner chose to submit an employment contract, it is proper to examine the terms set forth in that contract. The same regulation also indicates that a petitioner's statement must include "detail[ed] plans"; a generalized assertion of intent cannot suffice in this regard.

The Director's concerns about the contract between the Petitioner and [redacted] are valid, but The Petitioner has not had the opportunity to address specific, relevant issues regarding that document.

III. CONCLUSION

The final merits determination in the original decision was deficient in that it focused on the quantity of the Petitioner's awards and amount of press coverage. Also, the Director did not provide the Petitioner with an adequate opportunity to elaborate upon his plans for continued work in the United States.

As the matter will be remanded, the Director should request any additional evidence deemed warranted and allow the Petitioner to submit such evidence within a reasonable period of time.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.